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SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1932.**

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# No. 784

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C. N. BEVAN, APPELLANT,

*vs.*

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

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## STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED BY THE PLAINTIFF IN ERROR (APPELLANT) THAT THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF OHIO, AS REQUIRED BY RULE 12 OF THE SUPREME COURT OF THE UNITED STATES.

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Pursuant to paragraph 1, Rule 12, of the Supreme Court of the United States, plaintiff in error, Charles N. Bevan, who brought this suit under the name of

C. N. Bevan (appellant), presents and files this, his statement particularly disclosing the basis upon which it is contended by him that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Ohio desired to be appealed from:

A.

**Statutory Provision Sustaining Jurisdiction.**

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States on appeal is the Act of February 13, 1925, c. 229, Sec. 1 (43 Stat. 937; Jud. Code, Sec. 237; 28 U. S. C. A., Sec. 344), which provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.
> * * *";

as modified by the act of January 31, 1928, c. 14, Secs. 1 and 2 (45 Stat. 54), as amended April 26, 1928, c.

440, 45 Stat. 466 (28 U. S. C. A., Sec. 861*a* and 861*b*), which respectively provide:

> SEC. 861*a*. "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

> SEC. 861*b*. "The statutes regulating the right to a writ of eror, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

**Statutes of the State of Ohio the Validity of Which is Involved.**

The statutes of the State of Ohio the validity of which is involved are Ohio General Code, Sections 11497, 11503, 11510, 11511, 11512, and 11514, Vol. 3, The General Code of Ohio, 1910, pages 2465 to 2468, inclusive (Page's Annotated Ohio General Code, Vol. 2, pages 4732, 4735 to 4738; The Complete Ohio General Code, Page's Desk Ed., 1932, pages 2528, 2529; Throckmorton's Annotated Code of Ohio, 1929, pages 2890 to 2893). These sections provide as follows:

> "SEC. 11497. *Corporations; Officers May be Examined.*—At the instance of the adverse party, a party may be examined as if under cross examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may

be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony." (101 v. 139.)

"SEC. 11503. *What Subpœna to Contain.*—A subpœna shall be directed to a person named therein, and require him to attend at a specified time and place to testify as a witness. It also may direct the person it names to bring with him any book, writing, or other thing under his control, which he may be compelled to produce as evidence." (51 v. 57, Sec. 317.)

"SEC. 11510. *Contempt of Court.*—Disobedience of a subpœna, a refusal to be sworn, except upon failure to pay fees duly demanded, and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required." (51 v. 57, Sec. 322.)

"SEC. 11511. *When Attachment May Issue.*—When a witness fails to obey a subpœna personally served, the court or officer, before whom his attendance is required, may issue to the sheriff, coroner, or a constable of the county, an attachment, commanding him to arrest and bring the person named therein before such court or officer at the time and place the writ fixes, to give his testimony and answer for the contempt. But if it does not require the witness to be immediately brought, he may give a bond for a sum fixed, with surety, for his appearance, which sum shall be indorsed on the back of the writ, except that, if no sum be so indorsed, it shall be one hundred dollars. When the witness was not personally served,

the court, by a rule, may order him to show cause why an attachment should not issue against him." (51 v. 57, Sec. 323.)

"SEC. 11512. *Punishment for Contempt.*—Punishment for the acts of contempt specified in section eleven thousand five hundred and ten shall be as follows: When the witness fails to attend in obedience to a subpœna, the court or officer may fine him not over fifty dollars; in other cases, not more than fifty dollars nor less than five dollars; or he may imprison him in the county jail, there to remain until he submits to be sworn, testifies, or gives his deposition. (77 v. 42, 45.)

"SEC. 11514. *How Witness Released from Imprisonment.*—A witness so imprisoned by an officer may apply to a judge of the supreme court, court of appeals, common pleas or probate court, who may discharge him, if it appears that his imprisonment is illegal." (103 v. 405, 426.)

C.

**Date of Judgment Sought to be Reviewed and Date of Presentation of Application for Appeal.**

The judgment of the Supreme Court of Ohio desired to be appealed from was entered on the 25th day of January, 1933, and the application for appeal is presented and filed this 10th day of February, 1933.

**Nature of Case and Rulings of the Supreme Court of Ohio.**

This is a suit involving questions under the Federal Constitution as to the right of a State to empower

notaries public to imprison witnesses without judicial hearing or sanction. The action was begun in the Court of Appeals of Lucas County, Ohio, by plaintiff in error, C. N. Bevan, as petitioner, against the sheriff of Lucas County, Ohio, as respondent, to obtain petitioner's discharge from the custody of said sheriff. Petitioner had been committed as for contempt by a notary public for refusing to produce certain documentary evidence and to answer certain questions in the course of taking the deposition of petitioner for use in a civil action pending in the Court of Common Pleas of Lucas County, Ohio.

Petitioner was granted a writ of *habeas corpus* by the Court of Appeals for Lucas County, Ohio, which released petitioner on bail. On final hearing that court discharged the writ and remanded petitioner to the custody of the sheriff. Proceedings in error were filed and heard in the Supreme Court of Ohio, which affirmed the lower court, holding as hereinafter set forth.

In committing the petitioner the notary public purported to act under the Ohio General Code, Sections 11497, 11503, 11510 to 11512, inclusive, above quoted.

Under these sections as construed by the Supreme Court of Ohio, the notary *should* require a witness to answer only questions and produce only documentary evidence which are "pertinent to the issues tendered or made" and "in cases and under circumstances where a party might heretofore have been compelled to produce the same by the ordinary rules of proceedings in chancery," *Ex Parte Jennings*, 60 O. S. 319 (1899); *Ex Parte Schoepf*, 74 O. S. 1 (1906) (syllabus).

But the notary, who is a mere "ministerial" or "executive" officer, has the *power* to order the imprisonment of a witness for refusal to answer incompetent, irrelevant or immaterial questions and for the refusal to produce wholly incompetent, irrelevant or immaterial documentary evidence. The witness may disobey such order only at his peril. *The notary public is not vested with power or jurisdiction to hear and determine any questions as to the competency, relevancy or materiality* of any evidence and may, *without determining any of these questions,* order a witness to be committed to jail until he answers. No opportunity is afforded by the Ohio statutes for *judicial review* of any such order *prior* to imprisonment. *DeCamp v. Archibald,* 50 O. S. 618 (1893); *Ex Parte Jennings,* 60 O. S. 319 (1899); *In re Rauh,* 65 O. S. 128 (1901); *Ex Parte Schoepf,* 74 O. S. 1 (1906). See also the opinion of the court in the instant case.

It thus appears that the question as to whether petitioner should be imprisoned is by the laws of Ohio left to the uncontrolled will of a ministerial or executive officer, who has neither power nor authority to determine what would be a proper exercise of his statutory power and whose decision to imprison or not to imprison depends upon nothing but his mere will.

The record in the instant case shows that when the petitioner was committed to the custody of the respondent the notary public did not in fact hold any hearing, hear any arguments, give the petitioner or his counsel any notice or opportunity to be heard and

did not undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material, but that *in the absence of petitioner and his counsel* the notary signed and issued the order of commitment, which had been prepared and was presented to him by counsel for the party seeking to take the deposition.

It further appears that the particular notary public in the case at bar would have been disqualified to adjudicate, if he had authority so to do, by reason of the fact that he was selected and employed by, and the continuance of his employment was at the will of, the party seeking to take the deposition, and the amount of his compensation was directly dependent upon the length of the deposition and the number of writings to be copied therein.

Petitioner maintained, and now maintains, that the above sections of the Ohio statutes and the operation thereof under the facts of this case are unconstitutional and void, and that he has been by the authority of the State of Ohio deprived of his liberty without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

There is further involved in this case the question whether the purported subpœna *duces tecum* issued by the notary and served upon the petitioner was illegal and void and constituted an unreasonable search and seizure in violation of the Fourteenth Amendment to the Constitution of the United States.

In determining the questions presented the rulings of the Supreme Court of Ohio, as expressed in the

syllabus of the court, which under Rule VI of the Supreme Court of Ohio states the points of law decided, were as follows:

"1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

"2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. *DeCamp* v. *Archibald*, 50 Ohio St. 618, and *Benckenstein* v. *Schott*, 92 Ohio St. 29, approved and followed.

"3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege is preserved to him in the trial court.

"6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of *Tumey* v. *Ohio*, 273 U. S. 510, has no application whatever.

"7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this

character, the range of the testimony is wide and subpœnas *duces tecum,* which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures."

E.

**Cases Believed to Sustain Jurisdiction.**

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States:

*Weston et al.* v. *The City Council of Charleston,* 2 Pet. 449, 464 (1829).
*Tinsley* v. *Anderson,* 171 U. S. 101, 105 (1898).
*Bryant* v. *Zimmerman,* 278 U. S. 63, 70 (1928).
*Tumey* v. *Ohio,* 273 U. S. 510 (1927).

In addition, attention is invited to the memorandum opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the case of *In the Matter of C. N. Bevan,* on Habeas Corpus, in which the Court said—

"If the Supreme Court of Ohio should decide the case (the instant case) presented to it adversely to appellant's contention, it is open to

them to seek a review of its decisions by the Supreme Court of the United States."

Respectfully submitted,

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